THE THEORY AND PRACTICE OF LOCAL TAXATION IN THE UNITED STATES.

A NEW CHAPTER OF PROGRESS.

It is known to all who have examined the subject, that a hundred years ago or less the law-makers of England entertained very generally the same opinion in regard to the theory of local taxation which is yet popularly received in the United States, namely, that in order to secure exact justice and equality it is essential to attempt to subject all property of the tax-payer — real and personal, tangible and intangible, visible and invisible — to one uniform rate of valuation and assessment. And although it must then as now have been evident to every one on reflection, that in order to do this it would be necessary to endow the assessors with more than mortal powers of perception, so as to enable them to see what was invisible and measure what was intangible and incorporeal (debts and credits, for example), and that, in default thereof, this practical application of the theory must result in absurdity and injustice, yet it is curious to note that the change in English taxation, when it came about, was not due to any such process of reasoning on the part of the people, or to any positive enactment on the part of the state, but rather to a series of legal decisions by its courts, which gradually undermined the whole system of British local assessment, until it tumbled down, as it were, imperceptibly, and gradually became replaced from necessity by a theory which approximated more closely to the principle of political economy and the dictates of common-sense. Thus, one of the first of the old-time maxims which gave way under these decisions was the fiction of law that *all* property for the purpose of taxation followed the person or domicile of the owner (in virtue of which real estate was once taxed, under the British system, where the owner resided, in place of where the property was situated, used, and protected), and its replacement by the more rational principle that for all purposes of assessment the *situs* of property is where the property actually is: while other decisions of a similar character, following one another by intervals of years, forbade the taxation for local purposes of all evidences of national indebtedness, or "consols"; affirmed the *situs* of a vessel for taxation to be at the port of registry, irrespective of the domicile of the owner; and declared that all negotiable instruments are chattels personal, and the like; until the British system of local taxation, like the French, Belgian, and German, has come to be based on the assessment of comparatively few objects, and the avoidance in assessment to the greatest possible extent of all personal inquisition and arbitrary treatment.

So much, then, as preliminary to a circumstance of national importance and interest, to which the writer first asked the attention of the public in an article published some months ago in the columns of the New York Nation; and that is, that fiscal history in the Old World as thus related is repeating itself in a most curious manner in the United States, and that the abrogation and reform of the unjust and absurd systems of local taxation at present existing in most of the States, and for the effecting of which neither argument nor the lessons of experience have thus far availed anything, is in the process of gradual and certain accomplishment through the decisions of the courts of ultimate appeal and jurisdiction,— decisions given, furthermore, in each case as it were, abstractly and without any direct reference whatever to the important results certain to flow from their immediate and practical application. Among such decisions of the United States Supreme Court of recent date, with which the public are more or less familiar, the following may be cited: —

1. The denial to the States of the power to subject to any form of local taxation — direct assessment, license, or stamps — imported goods in their original packages, unbroken and unsold in the hands of the importer, on the general ground that the right to import carries with it an unrestricted right to sell. This decision, although first given by the United States Supreme Court many years ago, has been disregarded under various pretences by many State officials, especially those of Massachusetts, until within the past year, when, the question coming up under a new case, a new decision was given, so concise and unmistakable that all further misunderstanding and opposition are impossible.

2. The denial to the States of the power to tax United States bonds or other Federal instrumentalities, on the general ground that "*the power to tax involves the right to destroy*"; and again, "*that a tax on government stock is a tax on the power to borrow money on the credit of the United States.*" And as illustrative of the change in public opinion on this subject, consequent upon a better understanding of the principles involved in this decision, it may be stated that while at the present time no lawyer of repute can probably be found in the country who would be willing to maintain the independent and inherent right of a State to tax Federal instrumentalities, on the other hand, at the time of first issue of the 5-20's in 1863, an actual canvass of the bar association of one of our principal Eastern cities showed hardly one member who, when first questioned, entertained any other than an exactly opposite opinion. But notwithstanding this admitted change of sentiment, it is at the same time interesting to note that in most of the popular discussions which have taken place during the last few years in reference to the taxing of United States securities, the position is almost always taken, that although the right to tax the Federal bonds has not been given to the States, yet it would, nevertheless, have been just and expedient on the part of Congress at the time of the creation of the present national debt to have allowed the separate States to tax the evidences of such debt (i. e. the bonds) in the possession of their citizens, subject to a limitation, that the rate should not be different from that imposed upon other "moneyed capital." A full consideration of the whole subject will, however, suggest a doubt whether Congress possesses the power to grant any such authorization, inasmuch as to have done so would have been equivalent to authorizing the States to do an act which is in itself unconstitutional,—a thing which it is clearly evident that Congress cannot do. Thus "*the power to tax,*" says Chief Justice Marshall, in giving the opinion of the Supreme Court denying the right of the State of Maryland to tax the Bank of the United States, "*involves the power to destroy*"; and in the case of Weston *v.* The City of Charleston, the same court, by the same eminent authority, held further, "*that if the right to impose a tax exists it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the State or corporation which imposes it, which the will of such State or corporation may prescribe.*" For Congress, therefore, to have authorized the States to tax "national instrumentalities" would have been equivalent to authorizing the exercise of a right to destroy, which right, the Supreme Court has held, "cannot from its nature, when once existing, be limited."

3. The affirmation of the principle that the *situs* of a vessel for State taxation is only at the home port where she is owned and registered, and not where the vessel may happen to be, and therefore denying in a specific case the legality of an attempt on the part of the city of San Francisco to tax the vessels of the Pacific Mail Company, whose steamers, although running on the Pacific from San Francisco to Panama, were registered in New York City. (Hayes *v.* Pacific Mail Company, 17 Howard, 713; St. Louis *v.* Ferry Company, 11 Wallace, 423).

4. The denial to any State of the power to tax "bills of lading" given for goods transported from one State to another, by stamps or otherwise, on the ground that such a tax is an interference with foreign commerce or with commerce between the

States. (Almy *v.* California, 24 Howard, 169.) The legitimate inference from this decision, which was unanimous, would further seem to be, that if bills of lading given for goods transported from one State to another are *interstate* instruments, and as such cannot be subjected to State taxation, so bills, drafts, bonds, notes, mortgages, etc., made in one State and payable in another, must be all likewise placed beyond the power of State taxation.

Taxation of Negotiable Instruments.

Following the above several decisions of the Supreme Court of the United States limiting and defining the power of State taxation, we have now another and more recent decision, no less interesting and important, and determining, it would seem definitely, the hitherto questionable *situs* for State taxation of all that large class of personal property comprised under the general term "*negotiable instruments*," i. e. State, municipal, railroad, and other corporate bonds, circulating notes of banking institutions, promissory-notes payable to bearer, etc., etc. The case which gave rise to and called forth the decision referred to is reported in the fifteenth and last volume of Wallace, under the title of "State Tax on Foreign-held Bonds," pp. 306, 328, and in brief may be thus stated: —

The State of Pennsylvania, by a law passed May, 1868, required the officers of every company, except banks or savings institutions, incorporated and doing business in the State, to retain a tax of *five per cent* upon every dollar of interest paid by such company to its bondholders or other creditors, and to pay over the same to the State treasurer for the use of the Commonwealth. The plaintiff in this specific case, the Cleveland, Painesville, and Ashtabula Railroad Company, denied the legality of the tax, and, appealing to the State courts, alleged, among other things, the following in support of their position: —

"That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the act in question in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bondholders and the company, and is therefore repugnant to the Constitution of the United States and void."

The several State courts of Pennsylvania, however, affirmed the validity of the tax; but the case having been then carried on writ of error to the Supreme Court of the United States, the latter, at the close of the December term, 1872 – 73, reversed the judgment of the State courts, and decided in favor of the plaintiff; the opinions of the court, as expressed by Mr. Justice Field, being substantially as follows: —

1. *The power of taxation of a State is limited to persons, property, and business within her jurisdiction; all taxation must relate to one of these subjects.*

2. *The tax laws of a State can have no extra-territorial operation; nor can any law of a State inconsistent with the terms of a contract made with or payable to parties out of the State have any effect upon the contract while it is in the hands of such parties, or other non-residents of the State.*

3. *Bonds issued by a railroad company are property in the hands of the holders, and when held by non-resident of the State in which the company was incorporated, are property beyond the jurisdiction of the State.*

It will be observed under the *third* head (the language above quoted being the official prefatory syllabus of the decision) that the court lays down the rule that negotiable bonds are property, not in the place where issued, as was claimed by the authorities of Pennsylvania, and not at the domicile of the owner irrespective of actual presence as is generally claimed by State-tax officials, *but in the hands of the holders at the place where the bonds are actually situated*, whether the holders be actual *bona fide* owners or otherwise; and the following is the exact language in which this decision is expressed: —

"It is undoubtedly true that the actual *situs* of personal property which has a visible, tangible existence, and not the

domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same theory" (i. e. the actual *situs* determinative) "is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions: the former, by general usage, have acquired the character of, and are treated as, property in the place *where they are found, though removed from the domicile* of the owner; the latter are treated and pass as money wherever they are."

If, now, there is any meaning in words, and if the authority of the United States Supreme Court in defining the powers and jurisdiction of the States is as absolute as is generally supposed, it is clearly evident that the first clause of the above-quoted opinion effectually establishes the unconstitutionality and illegality of the theory and practice of the assessors of Massachusetts and other States, namely, that, in virtue of jurisdiction over the person and domicile, a State has a right to tax so much of the visible, tangible, personal property of its citizens, i. e. horses, cattle, stocks of goods, money, bullion, and the like, as may be *without* its territory and jurisdiction equally with that which may be *within* its territory and jurisdiction; the law of Massachusetts, for example, defining personal property for the purpose of taxation to be "goods, chattels, money, and effects, *wherever they are*." *

If it be objected that the court, by using the expression "in many cases," does not make its rule absolute and unqualified, the answer is, that the exceptions, when understood, will be found to be of a character which prove and strengthen the rule, rather than antagonize it. Thus, as has already been noticed, the Supreme Court some time ago decided that the *situs* for taxation of vessels which move about on the high seas or navigable inland waters must be at the home port where they are owned and registered; and it also stands to reason that the *situs* of such property as railroad cars, or other chattels which, as a condition of using, are perpetually *in transitu*, in order to avoid duplicate taxation and conflicting statutes, must be taxed, if taxed at all, under the head of the franchise of the company or owners. But in all cases where fixity or permanence are conditions of using, it may be unquestionably affirmed that the court intended to make no exceptions in its rule for determining where visible, tangible, personal property may be taxed, and where, also, it is of necessity exempted from taxation.

Taxation and Protection Correlative.

It ought to be superfluous, but, in view of existing opinions and practices, it is nevertheless expedient to say, that the reason of this rule is founded upon a circumstance alike conformable to law and common-sense, which is, that taxation and protection are correlative terms; or, in other words, according to the political theory of our governments, national and State, and, in fact, of every government claiming to be free, that taxes are the compensation which property pays to the State for protection, or, as Montesquieu, in his Spirit of Laws has it, and as the United States courts have again and again expressed it, that "the public revenues are a portion that each subject gives of his property in order to secure and enjoy the remainder." When, therefore, a State like Massachusetts assesses property situated beyond its territory and jurisdiction, and which its laws are not competent or able either to reach or to protect, or assesses one of its own citizens in respect to such property, the act has no claim to be regarded as taxation, but is simply arbitrary taking or confiscation, and a procedure which the Supreme Court has now, at least in this case, declared to be unconstitutional and, therefore, illegal and unwarranted. But the Supreme Court of the United States has placed itself on record before in respect to the principle that protection and taxation are correlative, and in one case, which appears to have almost wholly escaped the attention of the

* In Massachusetts, within the last three years, a citizen has been threatened with arrest and imprisonment for objecting to pay taxes in that State on stocks of goods located in a store in San Francisco and paying taxes thereon in the State of California. Bullion in the vaults of the Bank of England has also been taxed to citizens of Massachusetts as personal property within a very recent period.

bar and the public, its decision is invested with an historical as well as a legal interest. Thus, in September, 1814, the country being then at war with Great Britain, the town of Castine in Maine was captured by the British and remained in their exclusive possession until after the ratification of peace, in 1815. During this period the British government exercised all civil and military authority over the place; established a custom-house and allowed goods to be imported, which goods remained in Castine after it was evacuated by the enemy. After the re-establishment of the American government, however, the United States collector of customs, claiming a right to American duties on the goods in question, demanded payment of the same from the owners or importers, and, the claim being resisted, the case went up to the Supreme Court, where Judge Story, then upon the bench, gave judgment for the defendants as follows: —

"We are all of the opinion that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained there and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws and such only as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory on them; *for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience.*"

But to return to the subject more immediately under consideration. The court having thus affirmed the *situs* for taxation of personal property which has a visible and tangible existence, takes then a step farther forward, and in the second clause of the opinion above quoted, asserts that "the same thing is true of public securities, consisting of State bonds and bonds of municipal bodies and circulating notes of banking institutions"; namely, that their *situs* for assessment and taxation is wholly irrespective and apart from any whereabouts of the owner or his domicile, but is where the securities, bonds, and circulating notes actually are. So much, then, is so clear that even the most obstinate of assessors under the present arbitrary system will find it difficult in respect to the items specified to interpret the law and rule of action otherwise. But it is to be observed that negotiable railroad bonds are not, in the opinion quoted, mentioned specifically. That they, however, follow the same law as municipal and State bonds, and were intended by the court to be included in the same category, is, however, obvious, for the following reasons: 1st. The subject-matter of the case and of the decision was a railroad bond. 2d. The character of a railroad bond as a negotiable instrument is in all respects the same as a State or municipal bond. 3d. The reason which undoubtedly led the court (as it must every unprejudiced reader who thinks upon the subject) to the conclusion that State, municipal, and railroad bonds and bank-notes follow the same rule in respect to their *situs* for taxation as other personal property of acknowledged visible and tangible character is, that the property in all such instruments runs with the instrument, wholly irrespective of the residence of the owner, and consequently, in respect to title, passes by delivery. By public securities, also, the court undoubtedly means all negotiable securities which are payable to the public, that is, to bearer, whoever he may be; or, in other words, a public security, from its very nature, is subject to no previous equities between the original parties creating or issuing it, and the sum agreed to be paid is a liquidated and adjusted sum which must be paid to the public, that is, the holder; and the *situs* of such property from necessity follows the instrument to the public, and can be nowhere else than where the instrument actually is. On the other hand, if the instrument was subject to equities, the property might be where the parties creating it or owning it re-

sided. And if this position is not correct, dealings in all such securities or upon the stock exchange or in open market would be impracticable; inasmuch as the purchaser would be obliged to institute an investigation as to whether the title for each specific bond vested in the vendor or some other person; and as there is no registration of the transfer of such property, as there is in the case of real estate, the investigation must be practically impossible. So, also, in the case of circulating notes of banking institutions, if their title did not pass by delivery, or, in other words, if their *situs* as property was not under all circumstances accepted as in the hands of the holder, their use as money would be impossible; and the courts, recognizing this principle most fully, have always held that in cases where negotiable instruments or money have been stolen, and in consideration for value received have come into the hands of innocent third parties, the title to such property in the hands of the holders is perfect and irrefragable.

Again, the circumstance that State, municipal, and railroad bonds, and all other strictly negotiable instruments or public securities, even warehouse receipts payable to bearer, are subject to attachment by legal process only at the place where they actually are, and without regard to the whereabouts of the owner or his domicile, of itself also clearly defines and limits the *situs* of such property for taxation; for clearly a State which has the power to make a legal attachment operative against a given property has also the power to tax such property, while, on the other hand, a State which, through lack of possession and jurisdiction, cannot attach a specific property, certainly cannot enforce its tax laws against it, or give protection in case its rights or the rights of its owner are violated. And again, can the right to tax personal property exist in a State from which the property is so confessedly absent that there is neither right, power, nor possibility of passing title to it within the territory of the State by delivery?

That the view thus taken respecting the *situs* of negotiable instruments, and especially of railroad mortgage bonds, for taxation, is in strict conformity with the opinion of the Supreme Court, is also evident from the fact that, in summing up, the court held that not only was a mortgage bond issued by a railroad chartered by Pennsylvania, and in the hands of a non-resident, property out of the State, and as such beyond the jurisdiction of the taxing power of the State, but also that the State could not tax such property even when owned by a citizen and resident, unless the bond was at the time of assessment actually within the territory of the State. And as this point is a most important one, it is desirable to ask attention to the exact language of the court establishing it.

"We are clear," says Justice Field, "that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. *Even where the bonds are held by residents of the State,* the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax *upon that species of property in the State. When the property is out of the State, there can be no tax upon it for which interest can be retained.* The tax laws of Pennsylvania can have no extra-territorial operation."

Taxation of other Personal Property, "Choses in Action."

But there is yet another interesting feature of this case to be noted; for the court, having decided the *situs* for taxation of negotiable instruments, railroad bonds, etc., took occasion also to affirm the taxable *situs* of such other personal property or evidence of indebtedness as is generally included under the term *choses in action*, using in so doing the following language: —

"But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owner."

As thus expressed the reason given by the court for separating the *situs* for taxation of the two classes of personal property under consideration is so clear and so in accordance with common-sense as hardly to require any further explanation; and, therefore, it seems only necessary to assist the reader, who, if a tax-payer, is certainly interested in knowing the tax liability of his property, by recalling that, while in the case of negotiable instruments the title to the property runs with the instrument and passes by delivery, in case of bonds, mortgages, and promissory-notes made to particular persons, and thus non-negotiable, the title, on the other hand, does not run with the instrument, but exclusively with the person of the owner; so much so, that the attachment of a mortgage, or the possession by theft, or finding, of a note payable to a person, does not in any degree alienate or impair its original and legitimate ownership. The decision of the court, therefore, brings all classes of personal property under one harmonious and consistent rule for the purpose of taxation, legal attachment, and protection, by affirming that their *situs* as property is only where they are; which in the case of visible, tangible objects and negotiable instruments is dependent, from the very nature of things, upon actual and not constructive presence, and in the case of *choses in action* upon the domicile of the owner. And in thus deciding the court simply follows English precedents of long standing and the highest character; Lord Ellenborough in the King's Bench (McNeilage *v.* Holloway, 1 Barnwell and Allison's Reports, 218) having decided that a negotiable note was a chattel personal, and not a *chose in action;* Lord Abinger (The Attorney-General *v.* Bouvens, 4 Meeson and Welsby, 171), that all foreign government bonds payable to bearer have a *situs* where they are actually situated and are then taxable; and the House of Lords (Attorney-General *v.* Hope), that *registered* stocks and bonds of the United States and of the several States not passing by delivery are not negotiable instruments, and therefore not taxable as goods and chattels.

Practical Results of this Decision.

It may, however, be objected that the practical effect of this decision will be to relieve all negotiable instruments from taxation, inasmuch as, removed beyond the territory and jurisdiction of the State in which their owner resides, they will not, by reason of ready concealment, be easily cognizable by the assessors of the locality in which they are deposited. But admitting the objection in full force, as in all reason we must, what then? The Supreme Court has given its opinion, clearly and unmistakably; and until this opinion is reversed it constitutes the legitimate rule of action for both assessors and tax-payers. But suppose it were possible to reverse the opinion in question, would it be expedient to do so? Would it be desirable to abandon the plain common-sense view, that the *situs* for the taxation of all personal property is where the law protects it, and where alone an assessment and a legal attachment against it can be enforced, and in its place make *situs* depend on visibility? And if visibility, what degree of visibility? Shall a diamond, a bar of gold, or a railroad bond belonging to A B residing in Boston, but openly displayed in a jeweller's or broker's window in Philadelphia, be taxable in Pennsylvania, and a similar diamond, gold bar, or bond of the same owner deposited in a drawer of the same shop or office and not so readily visible, be taxable in Massachusetts? Shall we make the *situs* of property for taxation depend upon the keenness of perception or visual organs of an assessor? Or shall we not, rather, admit that the attempt to raise revenue by taxing such property as negotiable instruments which from their very nature are in a high degree intangible and invisible, and thus easy of concealment, which, passing by delivery, are here to-day and somewhere else to-morrow, which are not taxed in any other highly civilized country, and which are in great part even in this country specifically exempted by law, — i. e. United States bonds, legal tender, national bank-notes, etc., — is in itself an absurdity and a wrong; inasmuch as to enforce a levy from one man for one spe-

cies of property, because through his honesty, ignorance, or inability to escape he can be laid hold of, and allow identically the same description of property in the possession of another man to escape because of varying circumstances beyond the control of the assessors, is not taxation in any sense, but simply arbitrary taking? The decision of the Supreme Court, of which an analysis has been given, ought therefore to be regarded, as has been assumed in the title to this article, as constituting a real chapter of progress in American local taxation, because by contributing powerfully to break down the present popular system, which, founded on an erroneous and impracticable principle, never has been and never can be executed with justice and efficiency, the time is hastened when a better system shall be accepted and inaugurated. The logic of this decision, moreover, will not only pervade courts, — State and Federal, — but it will be felt in legislative halls and will be impressed upon the conscience of the people. The Court itself, in referring to the tax under consideration, says, with great point and truth, "*It is only one of many cases, where, under the name of taxation, an oppressive exaction is made, without constitutional warrant amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.*" Every State in the Union has in some form imposed such unreasonable and unwarrantable exactions. Personal property is generally, in this country, taxed by the absurd rule of *residence* of the owner; and thus all laws and rules of equity are violated when the rate of taxation is higher and the degree of protection and profit greater at the place of the owner's residence than at the place of the actual *situs* of the property, even if the location of the property is in the same State as the domicile of the owner. But this new decision teaches us that all personal property, if taxed at all, must be taxed in the city or town where found, and not elsewhere. The injustice and oppression is also the same as in the case of State ex-territorial taxation, when the tax is levied upon a person for property not within the taxing town-district, and at a higher rate than the rate in the district where the property is actually located and protected. It is only a question of degree of oppression, and this authoritative opinion of the United States Supreme Court will therefore be felt beyond the boundaries of court-rooms, and cannot fail to give a new impulse to the feeling that taxation without protection is merely legalized brigandage.

Recent Decision of the Supreme Court of California on the Taxation of Mortgages.

But any review of recent progress and the history of local taxation in the United States would be imperfect which failed to notice a most able and interesting decision given in May, 1873, by the Supreme Court of California, in regard to the taxation by its State authorities of real-estate mortgages. The question was one that for a considerable time had greatly interested the people of California, and the drift of popular sentiment, outside of San Francisco, seems to have been most unmistakably in favor of their taxation. But how to do it, and at the same time not increase the burden upon the borrower who had mortgaged his land as a security for a loan of capital to improve or stock it, was a problem that not a little troubled the law-makers in Legislature assembled. One proposition brought forward contemplated a deduction from the amount of land tax of the assessment on the mortgage; but as the lands of California were found as a rule to be taxed far below their value, and the mortgages for a value far in excess of the assessors' appraisement of the land they covered, it became soon apparent that this scheme was to a greater or less extent equivalent to exempting the land and taxing the mortgage. Another proposition embodied in a bill introduced into the Assembly by a member of the name of Wilcox was to make void all contracts by which borrowers agreed to reimburse lenders in the amount of the mortgage tax; while others again were exceedingly strenuous in favor of trying

the pleasing little experiment — which no community having once tried it ever desires to repeat — of providing that the person giving the mortgage should pay the taxes upon it, but be at the same time authorized to deduct the tax from the principal or interest in settling with his creditor. Pending these discussions, however, the Supreme Court, which had the question before it on a suit to which one of the savings banks of San Francisco was a party, rendered a decision, that in virtue of a clause in the Constitution of the State, requiring all taxation to be equal and uniform, the taxation of mortgages was unconstitutional and illegal; inasmuch as to tax a given property and then tax a mortgage on it, which mortgage is not in itself property, but like a deed or a lease, is a species of conveyance or acknowledgment of a conditional interest or right in the property, is not equal and uniform taxation, but an unequal and double tax on the property mortgaged. The importance of this decision, considered as an act reformatory of our popular theory of local taxation, does not require to be proved and illustrated; but as it is unquestionably a step in advance of any hitherto taken by either our Federal or State courts, and as, by reason of it, not only are mortgages now exempted from taxation in California, but also all promissory-notes and other evidences of indebtedness, it is desirable briefly to ask attention to the reasoning by which the Court was led to its conclusions.

The opinion was given by the Chief Justice Crockett, who, after reviewing the history of the case, is reported to have used the following language: —

"I come now to the point, whether a tax on land at its full value and a tax on a debt for money loaned, secured by a mortgage on the land, is in substance and legal effect a tax on the same property. We all know, as a matter of general notoriety, that almost universally, by a stipulation between parties, the mortgageor is obliged to pay the tax both on the land and on the mortgage. Practically he is twice taxed on the same value, if he has still in his possession the borrowed money to secure which the mortgage was made. The law taxes in his hand both money and land; and by his stipulation he is required to pay tax on the mortgage debt, and also, if the money has passed out of his hands into the possession of some other tax-payer, it is taxed in the hands of the latter, so that the money bears its share of taxation, and the land its share, in the hands of whomsoever they may happen to be."

"It is very true that a voluntary agreement on the part of the mortgagor to pay the tax on the mortgage debt cannot improve its *situs*. The State was no party to the contract, and is not bound by stipulation *inter alias*. The burdens of taxation cannot be shifted from those on whom the law imposes them by stipulations between private persons; but in the absence of such a stipulation, an inexorable law of political economy would impose upon the mortgagor the burden, in a different form, of paying the tax on the mortgage debt. Interest on money loaned is paid as a compensation for the use of the money, and a rate of interest as agreed on is the amount which the parties stipulate will be the just equivalent to the lender. If, however, by the imposition of a tax on the debt, the government diminishes the profit which the lender would otherwise receive, the rate of interest will be sufficiently increased to cover the tax, which in this way will be ultimately paid by the borrower. The transaction would be governed by the same immutable, inflexible law of trade, by reason of which import duties on articles for consumption are ultimately paid by the consumer, and not by the importer. The rate of interest on money loaned is regulated by the supply and demand which governs all articles of commerce; and the burdens imposed by law in the form of a tax on the transaction, which would thereby diminish the profits of the lender, if paid by him, will prompt him to compensate for the loss by increasing to that extent the rate of interest demanded. *If his money would command a given rate of interest without the burden, he will be vigilant to see that the borrower assumes the burden, either by express stipulation, or in the form of increased interest. This is a law of*

human nature, which statute laws are powerless to suppress, and which pervades the whole of trade governed by the law of supply and demand. Nor would the enactment of the most stringent usury laws produce a different practical result. Human ingenuity has hitherto proved inadequate to the task of devising usury laws which were incapable of easy evasion; and wherever they exist they are, and will continue to be, subordinate to that higher law of trade which ordains that money, like other articles of commercial value, will command just what it is worth in the market, no more and no less. Assuming these premises to be correct, and I am convinced that they are, it results that it is the borrower, and not the lender, who pays the tax on borrowed money, whether secured by mortgage or not; but if secured by mortgage, he is taxed not only on the mortgage and property, but on the debt which the property represents and which is held as a security for the debt."

Of the soundness of this decision there could probably be no more convincing illustration than the statement that, upon its announcement, the savings banks of San Francisco gave notice that they would immediately reduce the rate of interest on their loans secured by mortgages by the amount of the tax on the mortgage. And the Alta-California of May 9, in commenting upon the decision, says: "When the news arrived here yesterday morning" (that the Supreme Court had given a decision) "it was not unexpected; and the idea conveyed by the false rumors set afloat, that the decision was adverse to the savings banks, was accepted as a decision measured by expediency, and not based on sound legal principles. Special despatches received changed the result; and when it became evident that the banks and the mercantile community had triumphed, a general feeling of satisfacton was everywhere noticeable. Merchants, bankers, and tax-payers generally received the news with the feelings of men who felt relieved from a terrible incubus."

From the experience of the past year as above related, it must, therefore, be evident, that although public opinion is slow to change, and legislative bodies are unwilling to give the subject careful consideration, yet, notwithstanding, the work of tax reform goes forward; and that the day is not far distant when the theory that in order to tax equitably it is necessary to attempt to tax everything, will be as completely ignored and scouted from acceptance in the United States as it has been in every other country, our compeers in wealth, population, and civilization. It is also interesting to note how this record of recent decisions relative to local taxation coincides with and strengthens an observation made by more than one eminent writer on legal ethics and history, namely, that the law of judicial decision is not only absolutely necessary in every free and progressive society, but that it also contributes far more to the full and free development of such society than what may be termed, in contradistinction, the law of statute or legislative enactment; and that, in the action of our Courts, as in the instances referred to and others, we are but following the precedents of England, the jurisprudence of which country is, it is well known, based upon, or rather consists of, a mass of judicial decisions; and that England in turn has followed the precedents of Rome under the Republic, when the law-creating function resided for centuries far more in the Courts than in any legislative assembly.

David A. Wells.